Supreme Court, U.S.
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No. 95-1723

In The

# Supreme Court of the United States

October Term, 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA

and

JOANNE SIRAGUSA,

*Petitioners,*

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD.,

and

BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS TO BE PRESENTED

1. Whether the Ninth Circuit Court's decision that a civil RICO cause of action accrues when a plaintiff knows or should have known that he has been injured, as opposed to when he knows that the injury was caused by a defendant and is part of a pattern of racketeering activity is correct.

2. Whether the statute of limitations for a civil RICO cause of action can be tolled because of an ongoing bankruptcy proceeding or other suit for damages in another forum.

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## JURISDICTION

The jurisdiction is laid out appropriately in the subject Petition for Writ of Certiorari. As a result, these Respondents rely upon such jurisdictional representations by Petitioners.

## STATEMENT OF THE CASE

It is Respondents' position that the subject Petition for Writ of Certiorari should be denied based upon Petitioners' failure to bring their claim for RICO cause of action prior to the extinguishment of their right to do so, as pursuant to the four (4) year statute of limitations. Petitioners knew of their injury in May of 1989. They filed a Complaint in Bankruptcy Court alleging the same predicate facts as found in their Complaint filed with the United States District Court for the District of Nevada in November of 1993. Accordingly, the District Court was correct, as well as the Ninth Circuit, in reasoning that Petitioners should have brought their RICO cause of action in Bankruptcy Court in 1989, and because they failed to do so, the statute of limitations bars those claims as of November of 1993.

Equitable tolling was denied by both the District Court and the Ninth Circuit in this matter, premised upon Petitioners' failure to demonstrate any "determinative issues" which needed to be decided in Bankruptcy Court prior to their bringing the RICO action in the United States District Court. Based upon Petitioners' inability to illustrate underlying prerequisites necessary in Bankruptcy Court before they could bring their RICO cause of

action in that particular court to either the Ninth Circuit or the District Court, equitable tolling does not apply.

## ARGUMENT

### I.

### THE APPEAL COURT'S DISMISSAL OF SUIT AS BARRED BY THE STATUTE OF LIMITATIONS WAS APPROPRIATE

The decision by the United States District Court to dismiss the case as barred by the statute of limitations was appropriate based on the relative case law and its interpretation.

### (A) IN THE NINTH CIRCUIT, FEDERAL RICO CLAIMS' FOUR YEAR STATUTE OF LIMITATIONS BEGINS TO ACCRUE WHEN A PLAINTIFF KNOWS OR SHOULD KNOW OF THE INJURY WHICH IS THE BASIS FOR THE ACTION

Both the United States District Court for the District of Nevada and the United States Court of Appeals for the Ninth Circuit dismissed the present suit holding the statute of limitations had run prior to the commencement of this action.

The uncontroverted rule of law in this case is that the statute of limitations for federal/civil RICO actions is four (4) years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759 (1987); *Beneficial Standard Life Insurance Co. v. Madariaga*, 851 F.2d 271, 274 (9th Cir. 1988).

Despite this rule of law, there are, at least, three (3) distinct rules for accrual of a civil RICO claim. These



accrual rules are explained in detail in Petitioners' Writ of Certiorari and, in the interest of brevity, will only be defined in this Opposition.

The "injury discovery" rule is an import from the general Federal Rule of Accrual and is followed by the First, Second, Fourth, Fifth, Seventh, and Ninth Circuit Courts. This rule states that a civil RICO action limitation begins to run when a plaintiff knows or should know of the injury that underlines his action.[1]

The "injury and pattern discovery" rule followed by the Sixth, Eighth, Tenth, and Eleventh Circuit Courts maintains that a plaintiff must discover or be in a position to discover the existence of a pattern of racketeering activity in addition to the existence of the injury.[2]

The "Last Predicate Act" rule is followed by the Third Circuit and holds, quite favorably for plaintiffs, that the statute of limitations begins to run the date a plaintiff knew or should have known of the elements of the civil RICO cause of action, unless there is further

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[1] *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *Rodriguez v. Banco Cent.*, 919 F.2d 664, 665-68 (1st Cir. 1990); *Bankers Trust Co. v. Rhodes*, 859 F.2d 1096, 1102 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *LaPorte Constr. Co. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992).

[2] *Caprioni v. Prudential Securities, Inc.*, 15 F.3d 614, 619 (6th Cir. 1994); *Bath v. Buskhin, Games, Gaines & Jonas*, 913 F.2d 817 (10th Cir. 1990); *Bevins Office Garden Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991); *Granite Falls Bank v. Hendrickson*, 924 F.2d 150, 154 (8th Cir. 1991).

injury, and is part of the same pattern. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-31 (3rd Cir. 1988).

As stated above, the Ninth Circuit holds fast to the injury discovery rule. The seminal case on this issue is *Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990). In that case, the Ninth Circuit clearly set forth the rule that the statute of limitations begins to accrue when a plaintiff "knows or should know of the injury which is the basis for the action". *Stitt, supra*, 919 F.2d at 525. Further, knowledge regarding the source of one's injury is not a factor for a statute of limitations purpose. *Id.*

This rule set forth by the Ninth Circuit is in accord with the First, Second, Fourth, Fifth, and Seventh Circuits which follow the most restrictive rule. *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665 (1st Cir. 1990); *Bankers Trust Co. v. Rhodes*, 859 F.2d 1096, 1103 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1642, 104 L.Ed.2d 158 (1989); *Pocahontas v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *LaPorte Constr Co. v. Bayshore Nat. Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986).

The First Circuit Court clearly articulated the rule for the accrual of the limitations for Federal RICO actions in the case of *Rodriguez v. Banco Cent.*, 917 F.2d 664 (1st Cir. 1990). In that case, purchasers of land in Florida, which turned out to be a swamp, brought suit against a vendor alleging violations of the land sales act, securities laws, and Racketeer Influenced and Corruption Organization Act. The court held, among other things, that the four (4) year statute of limitations for civil actions under the RICO Act accrues when a plaintiff discovers or should have discovered his injury, and not when a plaintiff



should have known about the last predicate act which is part of the same pattern of racketeering activity alleged. *Rodriguez v. Banco Cent., supra.* In accord with this holding in the Ninth Circuit are the cases of *Beneficial Standard Life Ins. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) and *State Farm Auto Ins. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987). Thus, in the Ninth Circuit, the statute of limitations begin to run when a plaintiff discovers or should have discovered his injury, not when the last predicate act alleged could have produced the continued injury. In this particular case, the Ninth Circuit declined not to change its holding, as referenced in the above-cited cases, and determined that the statute of limitations begins to run when a plaintiff knew or should have known of the injury, and not when the last predicate act alleged occurred. As a result, this disposition has been held by the Ninth Circuit for over eight (8) years, and these Respondents would request this Court to not now overturn that ruling.

As the First Circuit succinctly laid out in the *Rodriguez* case at page 667, the reasons for not adopting the last predicate act doctrine are as follows:

> The "Last Predicate Act" rule can produce long limitation periods. As we have pointed out, that rule would permit a plaintiff, knowing of his injury in 1980, to begin suit to recover damages for that injury four (4) years after the last predicate act that is part of the pattern of racketeering activity that caused the harm. A "pattern of racketeering activity" merely requires two (2) specified criminal acts, "the last of which occurred within ten (10) years . . . after the commission of the prior act," 18 U.S.C. § 1961,

(5) and when to relate it to the amount to or pose a threat of continued criminal activity." (citations omitted). If the quotation "pattern" took the form of one related act, say, every two (2) years (so that each act "occurred within ten (10) years . . . after a prior act"), say, for thirty or forty years, the Third Circuit's test literally interpreted, would permit a plaintiff "injured in 1980" to bring suit thirty-four or forty-four years later. Even if one somehow led the statutory "ten year" referenced to cut off the chain or related events, the rule would extend the statute of limitations, giving a fully knowledgeable plaintiff fourteen, rather than four (4) years to bring suit. Such a reading of the statute is difficult to reconcile with the Supreme Court's determination that "there is a need for uniform statute of limitations for civil RICO" less the memories of witnesses fade or evidence [be] . . . lost. (citations omitted.) In fact, it seems directly inconsistent with the Supreme Court's choice of a four (4) year claim max statute instead of criminal RICO's five (5) year statute of limitations which indeed runs from the "last predicate act" (citations omitted). In any event, we do not know why a knowledgeable plaintiff should have fourteen rather than four (4) years to bring suit.

In the instant matter, Petitioners are apparently attempting to confuse the issue. The true nature of this case is that the Ninth Circuit in *Stitt v. Williams*, 919 F.2d 619, 624 (9th Cir. 1958) specifically adopted the rule of the First, Second, Fourth, Fifth, and Seventh Circuits. That rule unwaveringly holds that a RICO cause of action accrues when a plaintiff discovers or should have discovered his injury, as opposed to when a plaintiff knows or



has reason to know of the source of that injury. *See, Stitt, supra*, 919 F.2d at 525; *Rodriguez, supra*, 917 F.2d at 667; *Beneficial Life Ins. Co., supra*, 815 F.2d at 275; *State Farm Auto Ins., supra*, 828 F.2d at 5.

It is Petitioners' assertion that "the Ninth Circuit panel's defense in the injury discovery rule is weak and even incoherent." *See*, Petitioners' Writ of Certiorari, at p. 12. The court's defense of the injury discovery rule is clearly stated and leaves no room for argument. The Ninth Circuit explained that Petitioners' argument suggesting that the continuity prong of the elements which require at least one year to mature and the inherent problems with pulling an entire case together within the remaining three (3) year statute did nothing to advance their argument in favor of the injury and pattern discovery rule. *See*, the Ninth Circuit opinion, at p. 12, attached to Petition, Appendix "A". The Ninth Circuit also reasoned that this argument was not "persuasive enough to warrant abandonment of the injury discovery rule". *Id.* at 12, attached to Petition, Appendix "A". In fact, during the time of the hearing on this particular matter, the three (3) judge panel suggested to Petitioners that what they were requesting was for the Ninth Circuit to overturn a hard and fast rule when Petitioners, themselves, at no time requested an en banc hearing of this matter. The injury discovery rule, the court adds, encourages diligence in RICO prosecutions and ensures that this Circuit's rule that a civil RICO course of action arises when a plaintiff knows or should know that he has been injured. *Id.* at 12, attached to Petition, Appendix "A". Also, a review of the cases of *State Farm, supra*, and *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984) demonstrates the Ninth Circuit has

unwaveringly declined to apply the pattern discovery rule. As pointed out in *Compton, supra*, 732 F.2d at 1433, this Court held that a civil RICO limitations period "begins to run when a plaintiff knows or has reason to know of the injury which is the basis of the action."

Therefore, the test for the accrual of the statute of limitations is not when the last predicate act allegedly occurred, as Petitioners profess it should be, but rather, the statute begins to run when a plaintiff discovers or should have discovered the alleged injuries. The Complaint for civil RICO actions and subsequent supplemental authority for RICO and state causes of action would thus be barred by the Ninth Circuit rule if Petitioners discovered or should have discovered their alleged injuries prior to November 29, 1989. The Order issued by the lower court, as well as the Complaint filed in the Bankruptcy Court, clearly illustrate to this Honorable Court that Petitioners discovered their injuries as early as May of 1989, when they alleged the same fraudulent activities in Bankruptcy Court as are found in Petitioners Complaint filed with the United States District Court for the District of Nevada. *See*, Petition, Appendix "B".

Interestingly enough, in the preliminary bankruptcy proceedings, to avoid dismissal based upon the statute of limitations, Petitioners argued at that time that their Complaint as against these Respondents, filed in 1990, should be related back to May, 1989. When Petitioners filed their RICO Complaint, the United States District Court for the District of Nevada determined that once this relation back was applied in Bankruptcy Court, it became clear that Petitioners' federal RICO statute began to run when the injury was discovered, which that court



believed was evidenced by the filing of the original Complaint in Bankruptcy Court in May of 1989. The District Court reasoned that because Petitioners knew of their injuries, their claims were barred as against these Respondents, pursuant to the four (4) year statute of limitations applicable to the RICO cause of action. *See, Stitt v. Williams*, 919 F.2d 516 (9th Cir. 1990). *See, also*, Petition, Appendices "B" and "C".

## II.

## THERE IS NO LEGAL BASIS FOR ANY CLAIM FOR A TOLLING OF THE STATUTE

None of the arguments for tolling convinced the lower courts enough to prompt further exploration into the issue. Thus, the rule in this Circuit, as well as the majority rule, holds that the statute of limitations begins to run when a plaintiff should have known of his injury, regardless of whether the pattern of related racketeering activity continued. *See, Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-67 (1st Cir. 1990); *Bankers Trust Co. v. Rhodes*, 859 F.2d 1096, 1102-03 (2nd Cir. 1988). Accordingly, because Petitioners knew of their injury no later than May of 1989, and because they filed the present action on November 24, 1993, more than four (4) years after the date of accrual, Petitioners' RICO claims are barred by the statute of limitations.

Equitable tolling is completely inapplicable in the present case. Petitioners claim the case of *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir. 1980), *cert. denied*, 449 U.S. 831 (1980) stands for the general proposition that, "Equitable tolling is most appropriate when a

plaintiff is required to avail himself of an alternative course of action as a pre-condition to filing suit." *Connolly v. International Brothers of Electrical Workers*, 810 F.2d 913, 915 (9th Cir. 1987), citing *Mt. Hood, supra*. However, the case of *Mt. Hood* has been applied more specifically to circumstances in which "any administrative agency decided to determine issues with its primary jurisdiction." *Pace Industrial, Inc. v. Three Phoenix Co.*, 813 F.2d 234, 241 (9th Cir. 1987); *See, also, Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983). ("In this Circuit, the general rule is that if prior resort to administrative body is a prerequisite to relief in court, the running of the statute of limitations will be tolled during the administrative proceeding"), citing *Mt. Hood, supra*. Thus, the only question then becomes whether the Bankruptcy Court, in the exercise of its primary jurisdiction, had to first decide "determinative issues" before this Court could hear Petitioners' RICO claim. Both the District Court and the Ninth Circuit ruled that they did not. Clearly, in the adversarial proceeding filed in the bankruptcy matter, Petitioners could have alleged their RICO cause of action. They did not and, as a result, must bear the burden for their decision not to do so.

Since the *Mt. Hood* case, the Ninth Circuit Court has gone to great lengths to distinguish and to restrict its holdings concerning equitable tolling. The Ninth Circuit has stated on several occasions that the holding in the *Mt. Hood* case was premised upon considerations of federal policy and primary jurisdiction, and nothing more. *Pace Industrial, Inc. v. Three Phoenix Co.*, 813 F.2d 234, 241 (9th Cir. 1987); *Community Electric Services of Los Angeles, Inc. v. Nat. Electrical Contractors Assoc., Inc.*, 869 F.2d 1235,



1241 (9th Cir. 1989). In the above-cited cases, the Ninth Circuit refused to expand equitable tolling as found in the *Mt. Hood* case where federal considerations and primary jurisdiction were not at issue. In the case of *Pace, supra*, it was argued that the statute of limitations should be suspended pending the outcome of the state court action. The Ninth Circuit Court held that prior judicial actions "do not toll the statute of limitations, no matter how close the relationship to the one at bar", citing *Ramirez Dearellano v. Alvarez DeChoudens*, 575 F.2d 315, 319 (1st Cir. 1978); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 708, 86 S.Ct. 1107, 1114-15, 16 L.Ed.2d 192 (1966).

In the case of *Community Electric, supra*, citing *Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983), the Ninth Circuit decided not to extend the equitable tolling doctrine to a position where Union Local 440 brought proceedings before the National Labor Relations Board to establish its subsistence of payments as a mandatory subject of bargaining. The appellants in that case determined that the NLRB hearing should toll the statute of limitations. In that case, this Court held that the NLRB proceedings had not tolled the limitations, since prior resort to the board was not a prerequisite to review in federal court. This Circuit cited the case of *Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983).

In both of the aforementioned cases, the Ninth Circuit expressly held that in order for equitable tolling to apply, the *underlying prerequisite* must be mandatory before bringing an action in the court where the statute of limitations is asked to be tolled.

In the case at bar, Petitioners' attempted to bring forth the argument that they did not know the amount of damages, and that it was necessary for the bankruptcy proceeding to come to an end to make such a determination, was its prerequisite to bring a federal RICO action. This reasoning is wholly inappropriate and, as the United States District Court for the District of Nevada found, such "damage assessment" is not a prerequisite to bring a federal RICO claim in federal court. Moreover, the lack of diligence to discover all causes of actions at the time of bringing an initial suit is considered dilatory and does not mandate the tolling of the statute of limitations. *See, In Re: United States Management, Inc.*, 14 F.3d 1380 (9th Cir. 1994). As held in the matter of *In Re: United States Management, Inc.*, Petitioners in the instant matter are charged with the notice of all causes of actions that their investigation should have brought to light in May of 1989, the time of filing their original Complaint in Bankruptcy Court. Through over four (4) years of investigation, Petitioners allege they did not know that they had a RICO cause of action. However, the injury was well known. All facts were present which would have placed Petitioners on notice of their RICO cause of action and their dilatory tactics in not bringing that cause of action within four (4) years from May, 1989, does not amount to the federal policy considerations found in the Ninth Circuit to toll the statute of limitations.

Furthermore, the Ninth Circuit in this case held that given the aforementioned interpretation of the *Mt. Hood* case, Petitioners' claim fails. The Ninth Circuit determined, "Unlike the ICC's jurisdiction over immunity claims, the primary jurisdiction of the Bankruptcy Court



is not RICO claims. With respect to RICO claims, the Bankruptcy Court and federal court are more properly considered parallel avenues of relief." Even if Petitioners could have raised their RICO claim in some form in the bankruptcy proceedings, they could have simultaneously pressed their claim in federal court since the automatic stay did not apply to her claim against these Respondents, who were not the debtor. *See*, 11 U.S.C. § 362(a); *In Re: Kalispell Feed & Grain Supply*, 55 B.R. 627, 629 (Bankr.D.Mont. 1985); *In Re: Monetary Group*, 2 F.3d 1098, 1099 (11th Cir. 1993). Thus, the bankruptcy proceeding did not toll her RICO claim. *See*, the Ninth Circuit Order, at p. 21, attached to Petition, Appendix "A".

Therefore, due to the fact that Petitioners knew of the injury, not necessarily damages, no later than May of 1989, and because they filed the present action on November 24, 1993, more than four (4) years after the date of accrual, Petitioners' RICO claims are barred by the statute of limitations. Likewise, the bankruptcy proceeding does not toll the statute of limitations on the RICO claims.

## III.

## CONCLUSION

Based upon the foregoing, Respondents **PATRICIA L. BROWN** and **PATRICIA L. BROWN, LTD.** respectfully request this Honorable Court to deny the Petition for Writ of Certiorari presently before it upon the grounds that Petitioners' civil RICO claim is barred by the four (4) year statute of limitations and, further, that the ongoing bankruptcy proceeding does nothing to affect the running of

the statute of limitations. Therefore, such cannot preserve the claims since the statute of limitations has run.

Furthermore, Respondents respectfully request this Honorable Court to sustain the decision of the Ninth Circuit Court of Appeals and refuse to grant Petitioners' Writ in the instant matter.

DATED this 24th day of May, 1996.

Respectfully submitted,

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